The application of the *lis pendens* doctrine to personalty temporarily beyond the jurisdiction was before the court in the late case of *North Carolina Land Co.* v. *Boyer* (C. C. A. 6th Cir. 1911) 191 Fed. 552. The plaintiff had brought suit in North Carolina to foreclose a chattel mortgage upon rolling stock, and, pending the suit, a locomotive was attached, while in Tennessee, by creditors of the mortgagor. In an action of replevin it was held that the attachment, under the doctrine of *lis pendens,* was subject to the determination of the foreclosure suit in the plaintiff's favor. Since the locomotive, being absent only temporarily, retained its *situs* in North Carolina, the defendant was held to no unreasonable standard of diligence in being charged with constructive notice of the *lis pendens* in the particular jurisdiction of the *situs,* especially since the very character of the property was notice of its permanent location. It is submitted, however, that if the *situs* had actually been changed, a result which, in the case of ordinary chattels, would usually follow under the circumstances of the principal case, the doctrine should not have been applied.[13]

THE ELEMENT OF INTENTION IN ADVERSE POSSESSION.—In spite of the signification of the American Term "Adverse Possession"[1] it is well settled that the owner of land may lose his title under the Statute of Limitations even though for a part or all of the statutory period the land has been in the actual possession of one whose claim was for another and not adverse to all the world. In the cases of occupation by tenants for years,[2] for example, this result is easily reached on the theory that the adverse claimant holds by another person in possession, whose intention is to claim the fee, though not for himself, yet for his landlord. The same principle may be applied under the circumstances of the recent case of *Andrews* v. *Rio Grande Co.* (N. M. 1911) 120 Pac. 311, where it was held that a trustee might hold adversely through the possession of his *cestui.*[3] In all such cases, if the actual occupant has held for the full period of limitations, it seems that the understanding of the parties must determine whether the landlord or the tenant in possession shall become owner of the land. It should be borne in mind, however, that the evidence of the tenant's intent to hold for his own benefit, and repudiate his relation as such, must be of a very convincing character, since it is familiar law that such a legal wrong will not ordinarily be presumed.[4]

---

[13]The decision was also properly rested upon the additional ground that the mortgagor had no leviable interest in the property.

[1]See 10 COLUMBIA LAW REVIEW 761.

[2]Elliott *v.* Dycke (1884) 78 Ala. 151; Coyle *v.* Franklin (1893) 54 Fed. 644; Whitmore *v.* Humphries (1871) 41 L. J. C. P. 43. The same result is reached where the actual possession is in an agent, Whitehead *v.* Foley (1866) 28 Tex. 1, a mortgagor, *cf.* Parker *v.* Banks (1878) 79 N. C. 480, or a co-tenant. *Cf.* Unger *v.* Mooney (1883) 63 Cal. 586.

[3]The *cestui* is often called the tenant at will of the trustee, Lewin, Trusts, (12th ed.) 1130 and his possession is the possession of the trustee, Adams *v.* Burke (1875) 3 Sawy. 415; Hill, Trustees, (2nd Am. ed.) 266; Rogers *v.* White (Tenn. 1853) 1 Sneed 68; Marr *v.* Gilliam (Tenn. 1860) 1 Coldw. 488, to such a degree that the trustee is a proper plaintiff in a possessory action. Barker *v.* Furlong (1891) L. R. 2 Ch. 172.

[4]2 COLUMBIA LAW REVIEW 52; Bigelow, Estoppel, (3rd ed.) 393; Angell, Lim. of Actions, (6th ed.) 451.

But there is a class of cases in which the question of intention becomes of importance not only in determining the ownership of land already lost to the former owner by limitations but in discovering whether there has been any disseisin at all, sufficient to set the Statute in motion against the latter's title. Such a problem often arises in the western States when an entry under the preemption laws is made in ignorance of a title outstanding in a prior patentee. In a technical sense, there is here no such claim of the fee as is ordinarily requisite, under the authorities from Coke to the present time,[5] to constitute a disseisin, for of course the preemptioner usually intends to claim through a fee supposed to be in the government. Such a case should, therefore, in strictness be distinguishable from those mentioned above, and the conclusion has often been reached that, since the United States clearly had no intention to hold through the agency of the preemptioner and can therefore never, like the landlord in the cases above discussed, acquire the fee for itself,[6] there could be no disseisin[7] except in the rare cases when it could be shown that the occupant was holding in actual hostility to the government as well as to others; and conclusive proof of such design is demanded in order to outweigh the reluctance of the courts to presume the entryman a wrongdoer.[8] But though the soundness of this view may be technically unassailable, it leads to the strange result of ultimately placing the honest preemptioner, who intended to acquire title only if the government title were valid, in a worse position than one who entered *mala fide* in a dishonest expectation of holding to the exclusion of all. The practical absurdity of this conclusion has induced many courts to adopt the view of common sense, that the preemptioner's recognition of a non-existing government title is in fact no admission at all.[9] The situation of holding land up to a certain line mistakenly supposed to be the true boundary is strongly analogous. Though perhaps on strict theory an occupant, who intends to claim only up to whatever boundary should prove to be correct, makes no adverse claim to the strip erroneously occupied,[10] yet the courts have almost uniformly held that the requisite hostility

[5]Mere possession cannot work a disseisin, Creekmur *v.* Creekmur (1881) 75 Va. 430, for the law will not infer a wrong but will presume that the holding is in recognition of the true owner's title. Blake *v.* Shriner (1902) 27 Wash. 593. To rebut this presumption an intention to claim the fee must be shown, Bedell *v.* Shaw (1874) 59 N. Y. 46; Towle *v.* Ayer (1835) 8 N. H. 57, for "Disseisin seems to imply the turning of the tenant out of his fee and usurping his place or relation." Coke, Institutes, (Day's ed.) 266-*b*, n. 1. It is difficult to see how this could be done unless a claim to the entire fee is asserted against all. Beale *v.* Hite (1899) 35 Ore. 176.

[6]18 Harv. L. Rev. 380.

[7]Blum Land Co. *v.* Rogers (1895) 11 Tex. Civ. App. 184; Doe *v.* Beck (1895) 108 Ala. 71.

[8]Blum Land Co. *v.* Rogers *supra;* Smith *v.* Jones (1910) 103 Tex. 632; Altschul *v.* O'Neil (1899) 35 Ore. 202.

[9]No. Pac. Ry. *v.* Kranich (1892) 52 Fed. 911; Converse *v.* Ringer (1894) 6 Tex. Civ. App. 51; Maas *v.* Burdetzke (1904) 94 Minn. 295; *cf.* Searles *v.* DeLadson (1908) 81 Conn. 133. The California courts do not go into the question but maintain that a claim hostile to the particular plaintiff is sufficient. Hayes *v.* Martin (1873) 45 Cal. 559. At least one court makes a specific exception in public land cases. No. Pac. Ry. *v.* Kranich *supra.*

[10]Grube *v.* Wells (1871) 34 Ia. 148.

of intention will be inferred from the fact of occupation.[11] So in the preemption cases, the entryman's recognition of a right in the government which does not in fact exist leaves his claim so nearly equivalent to an actual claim of the fee that the courts, it is submitted, should again waive technical correctness of theory for expediency and fairness of results and presume an adverse holding from the entry itself and other acts consistent with a claim of ownership.[12] In this view, therefore, the lapse of the period of limitations should perfect the preemptioner's title, in accordance with the substantial intentions of the parties.

[11] 3 COLUMBIA LAW REVIEW 286; see Bond *v.* O'Gara (1900) 177 Mass. 139.

[12] The intention with which the entry was made is a question of fact, Hartman *v.* Huntington (1895) 11 Tex. Civ. App. 130, and the divergent views in the preemption cases result from the various intentions inferred from a given situation.